

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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In the Matter of

Amendment of Section 73.202(b)

Table of Allotments

FM Broadcast Stations

(Shorter, Orrville, Selma and Birmingham, Alabama)

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MB Docket No. 04-201

RM - 10972

RM - 11103

Federal Communications Commission
Office of Secretary

To: Office of the Secretary

Attn: Media Bureau

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PETITION FOR RECONSIDERATION

Scott Communications, Inc. (“Scott”), licensee of Station WJAM-FM, Orrville, Alabama, and Alexander Broadcasting Co., Inc. (“Alexander”), licensee of Station WALX(FM), Selma, Alabama, (the “Joint Parties”) by their counsel and pursuant to Section 1.429 of the Commission’s Rules, hereby file their Petition for Reconsideration of the decision by the Media Bureau (the “Bureau”) in the *Report and Order*¹ in the above-captioned proceeding.² The Bureau must reverse its decision in the *Report and Order* because it is inconsistent with Commission and Bureau precedent regarding the Commission’s priorities for FM allotments.³ Specifically, under priority (4), the Bureau failed to adequately address the Joint Parties’ proposal and in doing so incorrectly concluded that the retention of a seventh local service at Selma, Alabama, served the public interest better than the provision of new secondary service to 124,875 persons. In support hereof, the Joint Parties state as follows:

¹ *Shorter, Orrville, Selma, and Birmingham, Alabama, Report and Order*, 20 FCC Rcd 8236 (MB 2005).

² A summary of the *Report and Order* was published in the Federal Register on May 18, 2005 (70 Fed. Reg. 28461). Accordingly, this Petition for Reconsideration is timely. See 47 C.F.R. §§1.429(d), 1.4(b).

³ Those priorities are: (1) first full-time aural service; (2) second full-time service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) ("*FM Assignment Policies*").

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I. PROCEDURAL MATTERS

1. The Joint Parties filed a counterproposal in this proceeding. The *Report and Order* denied the counterproposal. The Joint Parties seek to have that decision reversed and the counterproposal granted. Accordingly, they are interested parties entitled to file this Petition for Reconsideration. *See* 47 C.F.R. § 1.429(a).

2. The questions raised by this Petition for Reconsideration are as follows:

- (a) Did the Bureau err by failing to adequately address the Joint Parties' proposal under priority (4) of the Commission's priorities for FM allotments?
- (b) In failing to adequately address the Joint Parties' proposal under priority (4), did the Commission err by preferring the retention of a seventh local service at a community over the provision of new secondary service to 124,875 persons?

3. The foregoing questions should be answered in the affirmative because the Bureau's decision is inconsistent with both the Commission's and the Bureau's established precedent for evaluating whether FM allotment proposals are in the public interest. The Bureau should therefore reverse its decision in the *Report and Order* and grant the Joint Parties' proposal.

II. FACTUAL BACKGROUND

4. The *Report and Order* considered two proposals to amend the FM Table of Allotments. First, SSR Communications Incorporated ("SSR") proposed the allotment of Channel 300A to Shorter, Alabama, as that community's first local service. Second, the Joint Parties proposed to (i) delete Channel 300A at Orrville, Alabama, and allot Channel 300C3 to Shorter, Alabama as that community's first local service, and (ii) delete Channel 265C2 at

Selma, Alabama, and allot Channel 265C2 to Orrville, Alabama. As the Bureau noted in the *Report and Order*, SSR's and the Joint Parties' proposals for Shorter, Alabama, both as a first local service, were mutually exclusive because they did not conform with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules to each other.⁴ Thus, assuming the validity of the proposals, the Bureau was required, in furtherance of its mandate under Section 307(b) of the Communications Act, as amended,⁵ to compare the proposals under the FM allotment priorities.⁶

5. In comparing the proposals under the FM allotment priorities the Bureau correctly determined that both proposals advanced priority (3) because both provided a first local service to Shorter, Alabama.⁷ The proposals were considered equal under priority (3) because they proposed the same community of license.⁸ The Bureau also correctly determined that the proposals had to be compared under priority (4), "other public interest matters."⁹

6. In comparing the proposals under priority (4), the Bureau essentially concluded that the retention of a seventh local service at Selma, Alabama, served the public interest better than the provision of new secondary service to 124,875 persons. This is because grant of SSR's proposal resulted in (i) a first local service at Shorter, Alabama, and (ii) new secondary service to 86,240 persons. These benefits were compared to the Joint Parties' proposal which would have resulted in (i) a first local service at Shorter, Alabama, (ii) new secondary service to 211,115

⁴ See 47 C.F.R. § 73.207(b).

⁵ See 47 U.S.C. § 307(b) (the Commission shall "provide a fair, efficient, and equitable distribution of radio service" among the various communities).

⁶ See *FM Assignment Policies*, *supra* at note 3.

⁷ *Report and Order* at ¶ 6.

⁸ When comparing proposals for first local service under priority (3), the Bureau compares the populations of the respective communities, and the community with a larger population is deemed to be more deserving of a first local service. See, e.g., *Weatherford, Blanchard, Elmore City, and Wynnewood, Oklahoma*, 20 FCC Rcd 428, ¶ 3 (MB 2005).

⁹ *Report and Order* at ¶ 6.

persons, and (iii) retention of six local services at Selma, Alabama. Thus, when the two proposals are compared, the net result is that SSR's proposal results in the retention of a seventh local service at Selma, Alabama, while the Joint Parties' proposal results in the provision of new service to 124,875 persons. However, in the *Report and Order*, the Bureau never discussed (or apparently considered) the fact that the Joint Parties' proposal would result in new secondary service to 124,875 persons. Further, even if the Bureau had considered this, the result reached in the *Report and Order* would still be contrary to both Commission and Bureau precedent.

III. DISCUSSION

7. In their counterproposal, the Joint Parties indicated that their proposal was in the public interest because, *inter alia*, it would result in new secondary service to 211,115 persons.¹⁰ Further, this gain in secondary service was 124,875 more than the gain in secondary service that resulted from grant of SSR's proposal.¹¹ However, there was no indication in the *Report and Order*, that the Bureau gave adequate consideration to this substantial gain in secondary service. The only substantive reference to the Joint Parties' showing of a large gain in service is that "the differential in persons to be served by the counterproposal would not justify a different resolution."¹² Nowhere in the *Report and Order* does the Bureau even acknowledge that the Joint Parties' proposal would provide new secondary service to 211,115 persons.

8. In support of its decision in this case, the Bureau cites its recent decision in *Keeseville, New York, and Hartford and White River Junction, Vermont*.¹³ In *Keeseville*, the Bureau concluded that the allotment of a new primary service outweighed a gain in secondary service to 93,000 persons. *Keeseville* is however distinguishable because, under priority (4), the

¹⁰ *Counterproposal* at p. 6.

¹¹ *Id.*

¹² *Report and Order* at ¶ 8.

¹³ 19 FCC Rcd 16106 (MB 2004) ("*Keeseville*").

Bureau granted a proposal because it concluded that the retention of a first nighttime local service was more in the public interest than gain in secondary service. Here, the benefit that outweighed a gain in secondary service to 124,875 persons was not the retention of a first nighttime service, it was the retention of a seventh local service. Thus, the Bureau's decision in *Keeseville* cannot be used to support the proposition that retention of a seventh local service outweighs a gain in secondary service to 124,875 persons.¹⁴ Based on the Bureau's decision in these cases and in this proceeding, it seems that, under priority (4), a new allotment will always be favored over a change in community of license to the same community with a much larger gain in secondary service. However, the Bureau has never expressly stated this, and, if this is the Bureau's policy, then it should say so. However, this cannot be the Bureau's policy because it would be contrary to Commission and Bureau precedent.

9. The Joint Parties' position is that when two conflicting proposals specify the same community such that the decision must be made under priority (4), a significantly larger gain in secondary service should be given some consideration. And, where, as is the case here, the community (Selma) losing local service is well served (6 local services for 20,512 people), the large gain in secondary service should be decisional. To counsel's knowledge, neither the Commission nor the Bureau has ever held that the retention of a seventh local service is in the public interest. In fact, the Bureau has expressly held that the provision of a fourteenth local service was not in the public interest.¹⁵ However, here, the Bureau held that, under priority (4),

¹⁴ A case that was not cited by the Bureau, but that is analogous to the facts in this proceeding is *Lake Havasu City, Arizona, and Pahrump, Nevada*. 20 FCC Rcd 2206 (MB 2005) ("*Pahrump*"). In *Pahrump*, the Bureau again favored the allotment of a new primary service over a gain in secondary service to 625,895 persons, 1,725 of which would receive their third aural service. The Joint Parties do not believe that this decision is correct under priority (4) either.

¹⁵ See *Sumter, Orangeburg and Columbia, South Carolina*, 11 FCC Rcd 6376, ¶ 6 (MMB 1996).

the retention of a seventh local service at Selma, Alabama, better served the public interest than the provision of new net gain in secondary service to 124,875 persons.

10. The Commission and Bureau recently affirmed that the provision of new secondary service is in the public interest.¹⁶ In *Wallace*, the Commission reviewed a Bureau grant of a proposal to reallocate Channel 264C from Wallace, Idaho to Bigfork, Idaho. In granting the proposal, the Bureau recognized that “the proposed reallocation would result in a preferential arrangement of allotments by providing a first local service to Bigfork and a net gain in service to 58,604 persons.”¹⁷ In affirming the Bureau’s decision, the Commission expressly acknowledged that, in addition to the provision of a first local service at Bigfork, the net gain in secondary service to 58,604 persons furthered the FM allotment priorities and was thus also in the public interest.¹⁸

11. The Bureau’s decision in *Wallace* is one of the many examples where it finds that the provision of new secondary service is a public interest benefit.¹⁹ However, in light of the Commission and Bureau precedent establishing that the provision of new secondary service is a public interest benefit, the Bureau finds here that the retention of a seventh local service is of a greater public interest benefit. The fact that the Bureau finds the retention of a seventh local service to be of a greater public interest benefit than the provision of a new secondary service to

¹⁶ *Wallace, Idaho, and Bigfork, Montana*, 19 FCC Rcd 15267 (2004) (“*Wallace*”), affirming *Wallace, Idaho, and Bigfork, Montana*, 17 FCC Rcd 2243 (MMB 2002).

¹⁷ *Id.* at ¶ 2 (emphasis added).

¹⁸ *Id.* at ¶ 6.

¹⁹ See, e.g. *Upper Sandusky and Caledonia, Ohio*, 19 FCC Rcd 3449 (MB 2004) (a net gain of service to 86,010 persons served the public interest); *Lebanon and Speedway, Indiana*, 17 FCC Rcd 25064 (MB 2002) (a net gain of service to 390,000 persons served the public interest); *Park City and Miles City, Montana, and Powell and Byron, Wyoming*, 17 FCC Rcd 7234 (MB 2002) (the Bureau expressly states that it considers net gain in service to be a significant public interest benefit).

124,875 persons is contrary the Commission's and the Bureau's existing policy and must be reversed.


IV. CONCLUSION

The Bureau failed to adequately address the Joint Parties' proposal in this proceeding. Further, under existing Commission and Bureau precedent, a net gain in secondary service is in the public interest and should be considered under priority (4). The same cannot be said for the retention of a seventh local service. Thus, the Bureau erred in this proceeding when it held that the retention of a seventh local service at Selma, Alabama served the public interest better than the provision of new secondary service to 124,875 persons. Therefore, the Bureau should reverse its decision in the *Report and Order* and grant the Joint Parties' proposal.

Respectfully submitted,

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June 17, 2005

CERTIFICATE OF SERVICE

I, Giselle Abreu, in the law firm of Vinson & Elkins, do hereby certify that on this 17th day of June, 2005, I caused copies of the foregoing "**Petition for Reconsideration**" to be mailed, first class postage prepaid, or hand delivered, addressed to the following persons:

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